No. 86-637

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

COMMUNICATIONS WORKERS OF AMERICA and
ITS LOCALS 2100, 2101, 2108, and 2110,

Petitioners,

v.

HARRY E. BECK, JR., *et alia*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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September 30, 1987

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

I. Do Sections 8(a)(3) and 9(a) of the National Labor Relations Act preclude a union from conditioning the employment of nonunion employees upon the latters' payment of a fee greater than their *pro rata* share of the costs the union incurs in the performance of its statutory duties as the employees' exclusive representative for the purposes of "collective bargaining" as defined in the Act; or, if Sections 8(a)(3) and 9(a) do not so limit a union, are they *pro tanto* unconstitutional under the First and Fifth Amendments to the Constitution of the United States?

II. If Sections 8(a)(3) and 9(a) of the National Labor Relations Act do preclude a union from conditioning the employment of nonunion employees upon the latters' payment of a fee greater than their *pro rata* share of the costs the union incurs in the performance of its statutory duties as the employees' exclusive representative for the purposes of "collective bargaining" as defined in the Act, is an alleged violation of those sections within the "primary jurisdiction" of the National Labor Relations Board as an "unfair labor practice", under the doctrine of *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959), or within the concurrent jurisdiction of the national courts?

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Petitioners,

v.

HARRY E. BECK, JR., *et alia*,

Respondents.

BRIEF FOR THE RESPONDENTS

Respondents Harry E. Beck, Jr., *et alia* ("the Employees") hereby submit their brief on the merits, urging affirmance of the Court of Appeals on the questions presented for review.[1]

SUMMARY OF THE ARGUMENT

I. NLRA Section 9(a) is the source of "governmental action" infusing Section 8(a)(3) and agreements negotiated thereunder. *Steele v. Louisville & Nashville Railroad Co.*, 323 U.S. 192 (1944), so held for the analogous provision of the RLA, Section 2, Fourth. And subsequently, the *Steele* doctrine has been applied to the NLRA in numerous of this Court's decisions. "Governmental action" aside, Sections

[1] The Employees' cross-petition in No. 86-966 contends that the remedy the Court of Appeals upheld violates the procedural requirements of *Ellis* v. *BRAC*, 466 U.S. 435 (1984), and *Chicago Teachers Union, Local No. 1* v. *Hudson*, ____ U.S. ____, 106 S. Ct. 1066 (1986). These questions are not now before the Court. However, *pace* petitioners Communications Workers of America *et alia* ("CWA"), the propriety of *any* procedures rests on the substantive interpretation of the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151 *et seq.* and the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151 *et. seq. Contrast* Brief for Petitioners (BP) at 3 n.2.

9(a) and 8(a)(3) deny exclusive representatives authority to condition the employment of nonunion employees on payments of "dues" or "fees" exceeding the employees' *pro rata* share of the representatives' statutory "collective-bargaining" costs under Section 8(d). This construction rests on the language, purpose, and judicial interpretation of Section 8(a)(3), and on this Court's construction of the parallel language of RLA Section 2, Eleventh in *IAM* v. *Street*, 367 U.S. 740 (1961), and later cases. And if Sections 9(a) and 8(a)(3) do license exclusive representatives to compel payment of arbitrary and unlimited amounts, they are *pro tanto* repugnant to the First and Fifth Amendments to the Constitution, perforce of *Abood* v. *Detroit Board of Education*, 431 U.S. 209 (1977), *National Cable Television Association, Inc.* v. *United States*, 415 U.S. 336 (1974), and numerous other decisions defining the sole legitimate basis for compulsory "fees" in a labor-relations context.

II. This case does not come within the "primary-jurisdiction" doctrine of *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959), because it involves a violation of the duty of fair representation; addresses the legality of agreements under Section 8(a)(3), which Congress excluded from the "primary jurisdiction" of the National Labor Relations Board; could call for arbitration as a remedy, in which event "primary jurisdiction" would not attach; and would raise serious constitutional questions should that doctrine be held applicable.

ARGUMENT

I. Sections 8(a)(3) and 9(a) of the National Labor Relations Act preclude CWA from conditioning the employment of nonunion employees on payment of more than a *pro rata* share of the costs of performing its statutory duties as their exclusive representative;

or, if they do not, Sections 8(a)(3) and 9(a) are *pro tanto* repugnant to the First and Fifth Amendments to the Constitution of the United States.

The substantive question here is tripartite: namely,

• Whether the most reasonable construction of NLRA Sections 8(a)(3) and 9(a), informed by their legislative purpose and exact parallelism to RLA Sections 2, Eleventh and 2, Fourth, is that a union may not condition the employment of nonunion employees on the latters' payment of more than their *pro rata* share of the costs the union incurs performing its statutory duties as those employees' exclusive representative for the purposes of "collective bargaining" as defined in NLRA Section 8(d).

• If such a construction is questionable, whether agreements negotiated under Section 8(a)(3) are the products of "governmental action", thereby requiring this Court to adopt that construction in order to avoid constitutional issues.[2] And,

• If such a limiting construction is not fairly plausible, whether Sections 8(a)(3) and 9(a) are repugnant to the First and Fifth Amendments to the Constitution.

The Employees show in Part I.B., *post*, that their construction of Sections 8(a)(3) and 9(a) is not open to serious question. And in Part I.C., *post*, they show that, if that construction is not adopted, Sections 8(a)(3) and 9(a) are unconstitutional.[3] But, first, they address the question of "governmental action" that CWA considers controlling.

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[2] *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937).

[3] Revealingly, CWA never denies this—predicating its defense of those sections solely on the supposed absence of "governmental action". *See* BP at 5, 12-21.

A. The agreement negotiated by CWA under color of the provisos to Section 8(a)(3) is subject to constitutional scrutiny as the product of "governmental action" because Sections 9(a) and 8(a)(3) clothe CWA with the *quasi*-legislative status of the Employees' exclusive representative and empower it to condition their employment upon the payment of "dues" and "fees".

CWA notes that an ostensibly "private decision" is the product of "governmental action" subject to constitutional scrutiny "'only when [the government] has exercised coercive power or has provided * * * significant encouragement'" to the private actor. But then it incorrectly concludes that, "[m]easured by that test, the instant case plainly involves purely private conduct", because the government neither coerced nor encouraged CWA and the employer to make the section 8(a)(3)-agreement *sub judice* here. Rather, CWA says, the 8(a)(3)-agreement resulted from "'private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract'". That the provisos to Section 8(a)(3) "sav[e 8(a)(3)-agreements] from condemnation by that section's otherwise blanket prohibition on discrimination against nonmembers of a union" is irrelevant, says CWA, because "a statutory provision exempting certain private conduct from [a] * * * prohibition does not transform the private conduct into state action".[4]

CWA mistakenly focusses only on part of the relationship between itself and the employer, ignoring the more telling relationship—inherent in the 8(a)(3)-agreement—between itself (alone or together with the employer) on one

[4] BP at 13-14, 15. CWA refers to the arrangement *sub judice* as a "union-security agreement", a tendentious characterization absent from the NLRA. The Employees designate it neutrally as an "8(a)(3)-agreement".

side and the Employees on the other side. Viewed in its full context, the agreement is hardly "private", because CWA *is and must be a statutory Section 9(a) exclusive representative*, exercising special legal powers and privileges as against both the employer and the Employees. If the employer in some Orwellian sense makes "free" choices within a regime of *compulsory* collective bargaining with CWA,[5] the Employees exercise not even that modicum of "freedom", but must accept as an inflexible condition of employment CWA's unilateral choices regarding 8(a)(3)-agreements and all other subjects of bargaining. Thus, the coercion material to "governmental-action" analysis derives from CWA's Section 9(a) status. For that reason, "the necessarily fact-bound inquiry that confronts [this] Court" where "governmental action" is concerned requires consideration of Section 9(a).[6]

CWA concedes that NLRA unions enjoy the "status" and "authority" of exclusive representatives, but contends that: (i) the unions' license to make 8(a)(3)-agreements *pre*-existed the NLRA; and (ii) the monopolistic character of exclusive representation is insufficient to support a finding of "governmental action" in an 8(a)(3)-agreement.[7] These contentions lack merit, because: First, the *pre*-NLRA common law of employment relations recognized nothing remotely akin to exclusive representation as later embodied in the NLRA and RLA. Second, the controlling decision on the *quasi*-governmental nature of exclusive representation is not one CWA discusses, but *Steele* v. *Louisville & Nashville Railroad Co.*[8]

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[5] *See* NLRA § 8(a)(5), 29 U.S.C. § 158(a)(5).

[6] *See* Lugar v. Edmondson Oil Co., 457 U.S. 922, 939 (1982).

[7] BP at 16-21.

[8] 323 U.S. 192 (1944).

1. The legal-historical facts. Prior to the National Industrial Recovery Act in 1933,[9] the notion of an "exclusive representative" empowered by statute to control dissenting employees was foreign to American industry: Employees' exposure to majority rule by unions depended on voluntary association under common-law contract principles.[10] And common law did "not recognize the right of any association to dictate to others what contracts [should or should] not be made",[11] especially where "the most serious right affecting a laboring man's life", the right of "gaining an honest livelihood", was concerned.[12]

Although common law acknowledged that a collective bargain *might* constitute an enforceable contract, few such agreements did.[13] However, the courts did develop theories—not without their difficulties because of the mutually contradictory premisses of collective and individual bargaining—to reconcile collective agreements with individual employment contracts.[14] *But these approaches all emphasized the*

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[9] Act of 16 June 1933, ch. 90, 48 Stat. 195, *declared unconstitutional in* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935). *See* J. Gross, *The Making of the National Labor Relations Board: A Study in Economics, Politics, and the Law* (1974), Vol. 1, at 89-103.

[10] *E.g.*, Sargent, "Majority Rule in Collective Bargaining Under Section 7(a)", 29 *Ill. L. Rev.* 275, 278 (1934).

[11] Cooks' Union v. Papageorge, 230 S.W. 1086, 1089 (Tex. Civ. App. 1921). *Compare* Texas & N.O.R.R. v. Brotherhood of Ry. Clerks, 281 U.S. 548, 571 (1930), *with* Coppage v. Kansas, 236 U.S. 1, 14 (1915) (liberty of individual to select a representative to make employment contracts is part of his liberty to make those contracts himself).

[12] Lucke v. Clothing Cutters' Local 7,507, 77 Md. 396, 405, 26 A. 505, 507 (1893).

[13] *See* the perceptive analysis in Petro, "Civil Liberty, Syndicalism, and the NLRA", 5 *U. Toledo L. Rev.* 447 (1974).

[14] *See, e.g.*, Witmer, "Collective Labor Agreements in the Courts", 48 *Yale L.J.* 195 (1938); Rice, "Collective Labor Agreements in American Law", 44 *Harv. L. Rev.* 572 (1931).

maintenance of personal autonomy for individual employees.[15]

Some cases considered collective agreements "usages or customs" incorporated within the individual contract—*if* the employee assented to and made "no express contract in conflict" with the collective bargain.[16] Even voluntary union members were not automatically disabled from contracting autonomously because of a collective bargain their union negotiated.[17] *A fortiori*, a nonunion employee "was not bound by any of [the union's] rules" in his employment relations.[18] Because the "*real* labor contract is made between the individual employer and the individual employee", a collective arrangement was only an unenforceable "understanding"; for "[t]o enforce [a] collective contract would be to deny the individual's liberty to make his own contract".[19]

Other cases treated unions as employees' agents, securing employment conditions that "may be enforced directly by the individual".[20] However, recognizing that union decisions arise by majority rule rather than individual choice,[21] the courts generally required that a collective arrangement be "ratified by the members of the union as individuals".[22] An employee's knowledge of the collective agreement did not

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[15] *See, e.g.*, Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229, 250-51 (1917).

[16] Hudson v. Cincinnati, N.O. & T.P. Ry., 152 Ky. 711, 718, 154 S.W. 47, 50 (1913).

[17] *E.g.*, *id.* at 714-15, 154 S.W. at 48-49.

[18] Hanson v. Innis, 211 Mass. 301, 305, 97 N.E. 756, 757 (1912).

[19] Christiansen v. Local 680, Milk Drivers, 126 N.J.Eq. 508, 511, 10 A.2d 168, 170 (1940) (emphasis supplied).

[20] Yazoo & M.V.R.R. v. Sideboard, 161 Miss. 4, 14, 133 So. 669, 671 (1931) (enforcement by nonunion employee).

[21] On the deficiencies of this theory arising out of the political nature of union decision-making, *see* Witmer, *ante* note 14, at 226-37.

[22] Panhandle & S.F. Ry. v. Wilson, 55 S.W. 2d 216, 219 (Tex. Civ. App. 1932).

evidence ratification, unless he "voted for" or "individually participated in the making of" the arrangement.[23] Union officials "could not create * * * a binding bargain * * * unless they had been authorized * * * by the members in some form sufficient to show mutuality of will and consent".[24] For the courts viewed collective bargains as "designed primarily for the individual benefit of the members", "and not to place it within the power of the organization * * * to affect the[ir] individual rights * * * theretofore secured [by contracts incorporating] the agreement".[25]

Still other cases treated employees as "third-party beneficiaries" of collective agreements,[26] but also held that a "third-party beneficiary can not be compelled to accept or act on the contract made for his benefit".[27]

In sum, prior to 1933, a collective agreement constituted only "a mutual general offer to be closed by specific acceptances" of individual employees.[28]

Exclusive representation under NLRA Section 9(a) and RLA Section 2, Fourth radically departs from this tradition. *First*, it outlaws bargaining by individual employees. For an employer to negotiate with individuals violates "the essential principle of collective bargaining" under Section 9(a), "even though the employees consent * * * or suggest the con-

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[23] Hudson, 152 Ky. at 716, 154 S.W. at 49; West v. Baltimore & O.R.R., 103 W. Va. 417, 422, 137 S.E. 654, 655 (1927).

[24] W.A. Snow Iron Works, Inc. v. Chadwick, 227 Mass. 382, 390-91, 116 N.E. 801, 804 (1917).

[25] Piercy v. Louisville & N.R.R., 198 Ky. 477, 484-85, 248 S.W. 1042, 1045 (1923).

[26] On the inadequacies of this theory, *see* Rice, *ante* note 14, at 595-97.

[27] Huston v. Washington Wood & Coal Co., 4 Wash. 2d 449, 452-53, 103 P.2d 1095, 1097 (1940).

[28] Yazoo & M.V.R.R. v. Webb, 64 F.2d 902, 903 (5th Cir. 1933).

duct".[29] Under exclusive representation, "[i]ndividual contracts, no matter what the circumstances that justify their execution or what their terms, may not be availed of to defeat or delay the procedures prescribed" for collective bargaining, "to forestall bargaining[,] or to limit or condition the terms of the collective agreement".[30] So, in terms of common-law contractual rights, exclusive representation "extinguishes the individual's power to order his own relations with his employer and creates a power vested in the chosen representative",[31] "strip[s individual employees] of traditional forms of redress",[32] and gives unions "a thraldom over the men who designate [them]" by "creat[ing] rights in [the] unions overriding those of the employees they represent".[33] Second, exclusive representation outlaws independent action by employers. They must negotiate "in good faith" with unions over all statutory subjects of collective bargaining.[34] Specifically, because 8(a)(3)-agreements are a mandatory bargaining-subject, employers may not refuse to negotiate on, or to compromise because philosophically opposed to, them.[35] And, if employers do accept 8(a)(3)-agreements, they may not refuse to enforce them;[36] and victimized employees are powerless to prevent that enforcement.[37]

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[29] Medo Photo Supply Corp. v. NLRB, 321 U.S. 678, 683-84, 687 (1944).

[30] J.I. Case Co. v. NLRB, 321 U.S. 332, 337 (1944) (NLRA). *Accord*, Order of Railroad Telegraphers v. Railway Express Agency, 321 U.S. 342, 346-47 (1944) (RLA). This alone refutes CWA's fantasy that "freedom" for the Employees exists under statutory collective bargaining because government supervises "the procedure alone". *See* BP at 13-14.

[31] NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 180 (1967).

[32] Vaca v. Sipes, 386 U.S. 171, 182 (1967).

[33] Medo Photo Supply Corp., 321 U.S. at 696, 697 (Rutledge, J., dissenting).

[34] NLRA §§ 8(a)(5), 8(d).

[35] *E.g.*, NLRB v. General Motors Corp., 373 U.S. 734 (1963); Queen Mary Restaurants Corp. v. NLRB, 560 F.2d 403, 409 (9th Cir. 1977); Preterm, Inc., 240 N.L.R.B. 654, 673 (1979).

[36] *E.g.*, Independent Stave Co., 248 N.L.R.B. 219, 220 (1980).

[37] *See* Dean v. TWA, 708 F.2d 486 (9th Cir. 1983) (RLA).

In short, to pretend (as does CWA) that Sections 9(a) and 8(a)(3) are not coercive, particularly as to the Employees, and that that coercion is not the direct, intended product of "governmental action", is laughable.

2. The* Steele *doctrine. CWA's refusal to address the seminal and still-controlling decision on the *quasi*-governmental character of exclusive representation, *Steele* v. *Louisville & Nashville Railroad Co.*,[38] reveals its awareness of the vacuity of its position.[39]

CWA's analysis of "governmental-action" precedent is disingenuous. First, it disposes of the one *labor-relations* case it cites, this Court's 1956 decision in *Hanson*,[40] by saying that "the critical element of the state action ruling in *Hanson* is absent here." Then, it cites certain *post*-1974 *non-labor* cases and says that, because *Hanson* does not apply, these cases control.[41] It does not acknowledge, however, that, as *Hanson* itself points out, the precedents on "governmental

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[38] 323 U.S. 192 (1944).

[39] CWA cites *Steele* only once, in its discussion of the "primary-jurisdiction" issue, *not* in relation to "governmental action". BP at 8.

More glaringly evasive is the brief *amicus curiae* of the United States, which cites *Steele* not at all, while expressing the Solicitor General's disbelief that the pre-emption theory of *Railway Employes' Dep't* v. *Hanson*, 351 U.S. 225 (1956), is "a satisfactory basis * * * for finding governmental action". Brief for the United States as Amicus Curiae (BUS) at 25-27. The Court should know that, before writing this brief, the Solicitor General, the General Counsel of the National Labor Relations Board, and other government personnel met with the Employees' counsel. At that time, the latter fully apprised all present of the Employees' reliance on *Steele* as controlling authority on the "governmental-action" issue. That, notwithstanding this early and complete intelligence, the Solicitor General found himself quite unable, not only to disprove the materiality of *Steele*, but even frankly to admit the existence of the case by so much as citing it, exposes the position of the United States as the product of politics rather than principle or precedent, deserving of as much consideration in the Court's deliberations as the Solicitor General chose to give to *Steele*.

[40] Railway Employes' Dep't v. Hanson, 351 U.S. 225 (1956).

[41] BP at 16-21.

action" under the RLA and NLRA begin as early as 1944, with *Steele*.[42]

Steele faced the question of whether an exclusive representative under RLA Section 2, Fourth may discriminate against nonunion employees. The Court easily divined "governmental action" sufficient to raise constitutional issues:

> For the representative is clothed with power not unlike that of a legislature which is subject to constitutional limitation on its power to deny, restrict, destroy or discriminate against the rights of those for whom it legislates and which is also under an affirmative constitutional duty equally to protect those rights. If the Railway Labor Act purports to impose on [the nonunion employees] the legal duty to comply with the terms of a contract whereby the representative has discriminatorily restricted their employment for the benefit and advantage of the [union's] own members, *we must decide the constitutional questions* * * * .

Avoiding these questions by statutory construction, the Court concluded that

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[42] 351 U.S. at 231: "the federal statute [*i.e.*, the RLA] is the source of the power and authority by which any private rights [of nonunion employees] are lost or sacrificed. Cf. *Steele* v. *Louisville & N.R. Co.*, 323 U.S. 192, 198-99, 204" (footnote omitted). As explained in detail below, these pages in *Steele* identify *exclusive representation* as the point of infusion of "governmental action" into the national labor laws.

Explication of *Hanson's* shadowy verbiage is not worthwhile. For even if, as CWA contends, *Hanson* found "governmental action" in Section 2, Eleventh on the exclusive basis of pre-emption, it would not preclude the discovery of *other* bases for finding "governmental action" in that section. Indeed, *Hanson* itself referred to others. 351 U.S. at 231-32 & n.4. Moreover, *Hanson* could be wrong on pre-emption as the source of "governmental action" in Section 2, Eleventh, and nevertheless correct on its existence. Indeed, this Court's opinion in *Ellis* v. *BRAC* indicates as much, by applying constitutional restraints to that section in a case arising in California, which (unlike Nebraska, whence *Hanson* arose) has no "right-to-work" law. *Contrast* 466 U.S. 435, 440, 455 (1984) *with* Hanson, 351 U.S. at 232 n.5.

> the Railway Labor Act imposes on the * * * representative * * * *at least* as exacting a duty to protect equally the interests of the members of the craft *as the Constitution* imposes upon a legislature to give equal protection to the interests of those for whom it legislates. *Congress has seen fit to clothe the representative with powers comparable to those possessed by a legislative body* both to create and restrict the rights of those whom it represents, * * * but it has also imposed on the representative a corresponding duty.

And, in his concurring opinion, Justice Murphy found that the

> *constitutional problem inherent in this instance is clear.* Congress, through the Railway Labor Act, has conferred upon the union * * * the power to represent the entire craft * * * in all collective bargaining matters. *While such a union is essentially a private organization, its power to represent and bind all members of a class* * * * *is derived solely from Congress.* The Act contains no language which directs the manner in which the bargaining representative shall perform its duties. But it cannot be assumed that Congress meant to authorize the representative to act *so as to ignore rights guaranteed by the Constitution.* Otherwise the Act would bear the stigma of unconstitutionality under the Fifth Amendment in this respect.[43]

Thus, *Steele* fixes the locus of "governmental action" in exclusive representation, refuting CWA's claim that *any* agreement an exclusive representative negotiates—and *a fortiori* an 8(a)(3)-agreement CWA itself concedes arguably discriminates against nonunion employees—is the product of "private" action.[44]

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[43] 323 U.S. at 198-99, 203 (emphasis supplied); 208 (separate opinion; emphasis supplied).

[44] BP at 13-16.

Decisively here, in holding that nonunion employees "are * * * deprived by [RLA Section 2, Fourth] of the right, which they would otherwise possess, to choose a representative of their own, and * * * cannot bargain individually", *Steele* referred to "the like provision of the [NLRA]" (Section 9(a)), and cited NLRA judicial precedents and legislative history as authority.[45] This equation of the two acts is hardly surprising, exclusive representation having been held identical under each seven years earlier.[46] Thus expectable was the Court's immediate extension of the duty of fair representation from the RLA to the NLRA, and its consistent explanation thereafter that *Steele* was the common source of the duty under both statutes.[47]

Since *Steele* in 1944, and bracketing the 1956 date of *Hanson*, this Court has repeatedly emphasized, citing *Steele*, the strong current of "governmental action" perfusing Section 9(a).[48] And it has *never* held, or even intimated, the contrary.[49]

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[45] 323 U.S. at 200, 202 n.3, *citing inter alia* J.I. Case Co. v. NLRB, 321 U.S. 332 (1944), *and* Medo Photo Supply Corp. v. NLRB, 321 U.S. 678 (1944), *along with* Order of Railroad Telegraphers v. Railway Express Agency, 321 U.S. 342 (1944) (an RLA case that relied on *J.I. Case Co.* as authority).

[46] Jones & Laughlin Steel Corp., 301 U.S. at 44-45, *citing* Virginian Railway Co. v. System Federation No. 40, 300 U.S. 515, 548-49 (1937).

[47] *See* Wallace Corp. v. NLRB, 323 U.S. 248, 255-56 (1944); Ford Motor Co. v. Huffman, 345 U.S. 330, 336-38 (1953), *origin explained in* Vaca, 386 U.S. at 177. So, as to exclusive representation, CWA is wrong to describe the NLRA and RLA as "materially different" from each other. BP at 12.

[48] *See* American Communications Ass'n v. Douds, 339 U.S. 382, 401-02 (1950); Vaca, 386 U.S. at 181-83; Allis-Chalmers Mfg. Co., 388 U.S. at 180-81.

[49] *Pace* CWA, BP at 19, and the United States, BUS at 26, who claim that *Steelworkers* v. *Weber*, 443 U.S. 193, 200 (1979), and *Steelworkers* v. *Sadlowski*, 457 U.S. 102, 121 n.16 (1982), are *contra*. In *Weber*, the complainant emphasized that "[t]his case arises under Title VII. No claim for relief based on the constitution is presented". Brief of Brian F. Weber, at 46 (footnotes omitted). This Court did note that, "[s]ince the Kaiser-UAW plan does not involve state action, this case does not present an alleged violation of the Equal Protection Clause of the Four-

continued

Of course, *Steele* and its progeny address exclusive representation, not 8(a)(3)-agreements. But, both the RLA and the NLRA condition a union's license to negotiate a Section 2, Eleventh- or 8(a)(3)-agreement on its status as a Section 2, Fourth or 9(a) representative. Moreover, this Court has countenanced Section 2, Eleventh-agreements because of the "fairness" in spreading to nonunion employees the costs incurred by exclusive representatives perforce of their statutory duty, under *Steele*, to represent these employees "fairly and equitably".[50] And this Court has acknowledged a similar causal link under the NLRA between exclusive representation and the need "to provide that there be no employees who are getting the benefits of union representation without paying for them".[51] Thus, the injection of "governmental action" into an 8(a)(3)-agreement, through the union's Section 9(a) status, could be no more direct in the language and operation of the statute—or more recognized in this Court's precedents both before and after *Hanson*—than it is.[52]

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teenth Amendment". 443 U.S. at 200. But that an agreement negotiated under color of a *national* law (the NLRA) does not involve *state* action says nothing about whether such an agreement involves "governmental action" at the *national* level.

In *Sadlowski*, complainant *voluntary union members* challenged an *internal* union election-rule. The case raised no issue of the union's authority as a Section 9(a) representative of *nonunion* employees. This Court rejected on "governmental-action" grounds Sadlowski's claim that the First Amendment applied to the internal union rule. 457 U.S. at 121 n.16. But that the *internal* relationship between a union and its *voluntary members* is not infused with "governmental action" says nothing about whether the *external* relationship between the union and *nonunion employees* forced to accept it as their exclusive representative is the product of "governmental action".

[50] IAM v. Street, 367 U.S. 740, 759-61 (1961). *See also* Hanson, 351 U.S. at 231, 235.

[51] Oil, Chemical and Atomic Workers Union v. Mobil Oil Corp., 426 U.S. 407, 415 (1976); *accord*, Radio Officers' Union v. NLRB, 347 U.S. 17, 40-41 (1954).

[52] Certainly Justice Douglas, the author of *Hanson*, had no difficulty thereafter espying "governmental action" in an 8(a)(3)-agreement. Buckley v. AFTRA, 419 U.S. 1093, 1095 (1974) (dissenting from denial of certiorari). And neither has Congress. *See* 126 *Cong. Rec.* 2580-85 (11 February 1980) (debate on NLRA amendment ultimately enacted as Pub. L. 96-593, 94 Stat. 3452, *now* 29 U.S.C. § 169).

3. CWA's alleged "precedents". *Pace* CWA and the United States, this Court's "governmental-action" decisions outside the peculiar area of labor relations—and, for that reason, of questionable relevance in the first place—*support* the conclusion *Steele* reached. *Jackson* v. *Metropolitan Edison Co.*, for example, did not hold an entity's "monopoly status" irrelevant to its *quasi*-governmental character, but simply required a "[s]ufficient relationship" between the entity's monopoly and its challenged actions.[53] Here, the relationship between the challenged 8(a)(3)-agreement and CWA's "monopoly status" as the Employees' Section 9(a) representative is enabling and causal, not just "sufficient". Similarly, *San Francisco Arts & Athletics, Inc.* v. *USOC* did not hold a congressional grant of *any* exclusive right to a private entity irrelevant to "governmental action", but simply ruled a grant of "a limited property right in the word 'Olympic'" "within the scope of trademark protections", because the USOC had earlier "distinguished the word * * * through its own efforts", and thereby acquired an exclusive right to use it.[54] To rely on that case, CWA must argue that Section 9(a) recognizes its *pre*-existing "limited property right" *in the Employees and their employment*! Hopefully, civilized discourse in this country no longer tolerates such notions.[55] Finally, *Church of Jesus Christ of Latter-Day Saints* v. *Amos* did not hold a congressional exemption from a statutory prohibition of "private" conduct arguably protected by the First Amendment irrelevant to "governmental action"—to the contrary, the Court treated the very existence of the exemption as a compelling cause for constitutional scrutiny.[56]

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[53] *Contrast* BP at 16-17 *with* 419 U.S. 345, 351-52 (1974).

[54] *Contrast* BP at 17-18 *with* 107 S. Ct. 2971, 2980 (1987).

[55] *See* U.S. Const. amend. XIII.

[56] *Contrast* BP at 15-16 *with* 107 U.S. 2862, 2865 (opinion of the Court), 2870 n.1 (opinion of Brennan, J.), 2874 (opinion of O'Connor, J.) (1987).

Other of this Court's decisions offer analogies favorable to the Employees.[57] But, even without their weight, CWA's case on "governmental action" collapses: For *Steele* and its progeny control. And neither CWA nor the United States can muster the wit or pluck to address their challenge.

4. Summary of the Employees' Section 9(a), 8(a)(3) analysis. "Governmental action" arises from CWA's Section 9(a) status as the Employees' exclusive representative uniquely authorized to negotiate an 8(a)(3)-agreement in derogation of their *pre*-NLRA common-law powers and privileges to contract for themselves. *Steele* found "governmental action" in exclusive representation, holding that constitutional questions would arise if that status licensed discrimination against nonunion employees. The provisos to Section 8(a)(3) permit agreements that are *per se* "discriminatory" (in that they compel unwanted affiliations with unions), but permissible to the extent they require "employees who receive the benefits of union representation * * * to contribute their share of financial support to [the] union", and not "for any purpose other than" that.[58] If (as CWA urges) Congress intended the Section 8(a)(3) exemption to permit discrimination against nonunion employees beyond the *quid pro quo* of "dues" and "fees" in exchange for services rendered by the exclusive representative in that capacity, then the constitutional issues of which *Steele* warned must be addressed.

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[57] "Governmental action" obtains here because: (1) Section 9(a) politicizes employees' rights through elections imposed and regulated by the national government. *See* Flagg Brothers, Inc. v. Brooks, 436 U.S. 149, 157-58 (1978) (collecting authorities). (2) The NLRA does not merely "approve" 8(a)(3)-agreements, but creates the Section 9(a) privileges and powers unions exercise to negotiate them. *Cf.* Lugar, 457 U.S. at 937. (3) An 8(a)(3)-agreement derives from a union's Section 9(a) status, which itself derives from the union's invocation of the act's election-machinery. *Cf. id.* at 932-34. (4) But for its governmentally granted Section 9(a) status, for which Congress is ultimately responsible, a union may not compel nonunion employees to pay "fees" to it. *Cf.* Blum v. Yaretsky, 457 U.S. 991, 1004 (1982). (5) A union possesses Section 9(a) functions and powers only by virtue of national law. *Cf.* Polk County v. Dodson, 454 U.S. 312, 317-18 (1981).

[58] Radio Officers' Union, 347 U.S. at 39-42.

B. Irrespective of the "governmental action" infusing them, Sections 8(a)(3) and 9(a) limit the "dues" and "fees" CWA may demand from the Employees to their *pro rata* share of the costs of performing its statutory duties as their exclusive representative.

These issues need not be faced, however, because the most reasonable construction of Sections 8(a)(3) and 9(a), consistent with their undeniably primary purpose, is that CWA may require the Employees to pay no more than the *pro rata* share of the costs of performing its statutory duties as exclusive representative. This construction of the NLRA finds compelling support in the Court's identical construction of Sections 2, Eleventh and 2, Fourth of the RLA, sections parallel in language and purpose to their NLRA counterparts, and enacted in 1951 precisely to extend to exclusive representatives under the former act the privilege to negotiate 8(a)(3)-type agreements permitted in the latter act in 1947.

1. The most reasonable construction of the language of Sections 8(a)(3) and 9(a), informed by their legislative purpose, limits the "dues" and "fees" CWA may demand from the Employees.

Section 8(a)(3) is "not ambiguous".[59] This circumstance, however, does not obviate thoughtful construction of that section in the context of other relevant sections of the act, in light of the section's legislative purpose, and with deference to this Court's precedents. Such an approach CWA does not take, though, instead offering a naively *hyper*-literalistic reading of Section 8(a)(3) that pretermits all those considerations.

CWA assumes—without proof—that "dues" and "fees" in Section 8(a)(3) refer to whatever a union charges its volun-

[59] *Id.* at 42, *quoted in* BP at 21.

tary members for its institutional activities, *whether or not those activities constitute performance of its statutory duties as a Section 9(a) representative*: that is, "*full* union dues".[60] Were this simplism proper, "membership" in Section 8(a)(3) would also mean "*full* union membership" in an institutional sense, *with all its badges and incidents beyond mere representation under Section 9(a).*

This, however, is not the law. Relying on the intent of Congress "to prevent utilization of [8(a)(3)-]agreements for any purpose other than to compel payment of union dues and fees",[61] this Court has repeatedly held that "the burdens of membership upon which employment may be conditioned are expressly limited to * * * payment * * *. 'Membership' is whittled down to its financial core".[62] The Court justified this departure from CWA's naif reading of "membership" by explaining how "the 1947 amendments [to Section 8 of the NLRA] * * * made significant alterations in the meaning of 'membership' for the purposes of [8(a)(3)-agreements]".[63] And if this approach is required to define "membership", it must be equally mandatory to define "dues" and "fees".

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[60] CWA's assumption derives not from a statutory definition of "dues" and "fees"; for none there is. Neither does it arise from any analysis disproving the Employees' position. Rather, CWA dilates on "legislative history" supposedly evidencing congressional intent to license limitless exactions through 8(a)(3)-agreements. But this history begs the question of what Congress meant by the words "dues" and "fees". For nowhere does it define those terms as "*full* union dues". Instead, to the extent leading legislators relied on the so-called "Rand Formula" for an implicit definition, the history refutes CWA's theory. *Contrast BP* at 33-34 *and* BUS at 16 *with post*, pp. 21-22.

[61] Radio Officers' Union, 347 U.S. at 40-42.

[62] NLRB v. General Motors Corp., 373 U.S. 734, 742 (1963). *Accord*, Local 1625, Retail Clerks v. Schermerhorn, 373 U.S. 746, 751 (1963); Pattern Makers' League of North America v. NLRB, ____ U.S. ____, ____ & n.16, 105 S. Ct. 3064, 3071 & n.16 (1985).

[63] General Motors Corp., 373 U.S. at 742.

a. Statutory language and logic. A limited construction of "dues" and "fees" in Section 8(a)(3) follows from the interrelationship among NLRA Sections 2(5), 7, 8(a)(3), 8(d), and 9(a). Section 2(5) defines a "labor organization" as

> any organization * * * which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

Although this definition—intentionally narrow for the special purposes of the statute—can subsume a traditional union such as CWA, which has many *extra*-statutory purposes, it indicates that *those* purposes are *not* what a "labor organization" may rely upon the NLRA to further. Then, Section 7 grants all employees the "right to refrain" from

> concerted activities for the purpose of collective bargaining or other mutual aid or protection, * * * except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section [8(a)(3)] * * * .

Coupled with this Court's decisions in which "'[m]embership' is whittled down to its financial core", this section exposes nonunion employees to a limited liability to pay "dues" and "fees" to a "labor organization" the unique statutory purpose of which is "dealing with employers concerning * * * conditions of work". Next, Section 8(a)(3) disallows even that liability unless "such labor organization is the representative of the employees as provided in section [9(a)]". Thus, the "labor organization" not only must have an unique statutory purpose, but also must enjoy the special statutory status of an exclusive representative. Section 9(a), though, emphasizes that

> [r]epresentatives designated for the purposes of collective bargaining by a majority of employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees * * * for the purposes of collective bargaining * * * .

In such wise, the act mandates that "*the* purpose" an organization must have to qualify as a "labor organization" is the *only* purpose for which it may act as an exclusive representative. And finally, Section 8(d) re-emphasizes a "labor organization's" circumscribed authority, by defining "collective bargaining" as used in Section 9(a) to mean the exclusive representative's statutory

> obligation * * * to meet * * * and confer [with the employer] in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached * * * .

So, overall, the act outlaws every 8(a)(3)-agreement that does not finance an exclusive representative *qua* representative only.

Indeed, if as a specific matter only a Section 9(a) representative may compel payments from nonunion employees under Sections 7 and 8(a)(3); and if as a general matter that representative may compel those employees to accept its decisions only as to "collective bargaining"; then the specific exception must reflect the general requirement, and limit the representative's use of those payments to "collective bargaining", too. Otherwise, neither the statutory language, nor this Court's construction of it, makes practical sense.[64]

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[64] In particular, adopting CWA's notion that non-bargaining, institutional expenditures of an exclusive representative may be the subject of an 8(a)(3)-agreement renders nonsensical "the policy of voluntary unionism imbedded in the [NLRA]". Pattern Makers' League of North America, ____ U.S. at ____, 105 S. Ct. at 3071.

b. Statutory purpose. These obvious inferences from statutory language and logic find vindication in the overriding congressional purpose underlying the Section 8(a)(3) provisos: namely, to eliminate so-called "free-riders". As this Court long-ago held, the lesson of the legislative history is that Congress enacted Section 8(a)(3) "to meet that problem".[65]

CWA pretends that Congress aimed Section 8(a)(3) only at certain historical "abuses", unconcerned with how exclusive representatives might spend coerced "dues" and "fees". The true burden of the debates, however, is that Congress perceived these abuses as "too serious and numerous to justify permitting [the then-existing] law [authorizing compulsory unionism] to remain unchanged", and adopted Section 8(a)(3) only after "leaders of organized labor * * * stressed * * * that in the absence of such provisions many employees sharing the benefits of what unions are able to accomplish by collective bargaining will refuse to pay their share of the costs"[66]—that is, after "leaders of organized labor" raised the "free-rider" problem as justification for 8(a)(3)-agreements.

Of course, finding the result uncongenial today, the "leaders of organized labor" now before this Court unabashedly repudiate the legislative compromise of 1947, and deny the "free-rider" limitation in Section 8(a)(3). Yet both they and their political allies admit that, in that section, Congress "adopt[ed] the 'Rand Formula'", from a then-recent arbitration-decision of Justice I.C. Rand of the Supreme Court of Canada.[67] The "Rand formula", however, unequivocally applies the "free-rider" thesis, holding it

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[65] Radio Officers' Union, 347 U.S. at 41. "Congress' decision to allow [8(a)(3)-] agreements *at all* reflects [that] concern * * * ." Oil, Chemical and Atomic Workers Union, 426 U.S. at 415-16 (emphasis supplied).

[66] Sen. Rep. No. 105, 80th Cong., 1st Sess. (1947), at 6.

[67] BP at 38, 33-34; BUS at 16 & n.14.

> not * * * inequitable to require of all employees a contribution towards the expense of maintaining employee interests, of administering the law of their employment[,]

and defining "the amount to be deducted" from employees' wages as *not* including

> an increment in an assessment which relates to special union benefits * * * in which the non-member employee as such would not participate or the benefit of which he would not enjoy.[68]

In as much as nonunion employees cannot require a union to provide benefits that do not derive from the union's status as exclusive representative, and the union cannot require the employees to accord it that status other than with respect to "collective bargaining" as defined in Section 8(d), the "Rand Formula" amounts to a precursor of the "test" this Court adopted under Sections 2, Fourth and 2, Eleventh of the RLA: namely,

> whether the * * * expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the [nonunion] employees in dealing with the employer on labor-management issues.[69]

In sum, its language, logic, and purpose sustain as the most reasonable construction of Section 8(a)(3) limitation of "dues" and "fees" to the Employees' *pro rata* share of the costs CWA incurs performing its Section 9(a) duties.[70]

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[68] *In re* Arbitration between Ford Motor Co. of Canada, Ltd. and UAW, 17 L.R.R.M. 2782, 2783 (1946).

[69] Ellis, 466 U.S. at 448.

[70] The National Labor Relations Board ("Board") has taken contradictory positions. Local No. 959, Teamsters (RCA Service Co.), 167 N.L.R.B. 1042, 1044-45

continued

2. The parallel language and purpose of Sections 8(a)(3) and 9(a) of the National Labor Relations Act and Sections 2, Eleventh and 2, Fourth of the Railway Labor Act compel application to Sections 8(a)(3) and 9(a) of the limiting construction this Court has repeatedly applied to Sections 2, Eleventh and 2, Fourth.

The language, purpose, legal history, and this Court's interpretation of Section 2, Eleventh confirm the Employees' construction of Section 8(a)(3).

CWA contends that "NLRA § 8(a)(3) cannot plausibly be read as was RLA § 2, Eleventh", for two reasons: (i) this Court's construction of Section 2, Eleventh was strained to avoid deciding constitutional questions that cannot arise with respect to Section 8(a)(3) because of the lack of "governmental action" therein; and (ii) the historical evolution of the two sections was different.[71] But what appears "implausible" to CWA this Court and leading commentators have accepted as self-evident.[72] And CWA's thesis is less than cogent, anyway: For, first, there is as much "governmental action" in the NLRA as in the RLA (as the Employees explain in Part I.A., *ante*); and, even if there

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(1967); Detroit Mailers Union No. 40, 192 N.L.R.B. 951, 951-52 (1971). Typically, CWA pretends this schizophrenic behavior never occurred, saying that the Board has "consistent[ly]" supported its view. BP at 23 n.13. The United States attempts to finesse the embarassment. *See* BUS at 14, 23 (citing the decisions for other propositions).

[71] BP at 40-42. The United States tags along on these arguments, too. BUS at 21-26.

[72] *Compare* Ellis, 466 U.S. at 452 n.13 (Sections 8(a)(3) and 2, Eleventh are "equivalent provision[s]"), *with, e.g.*, Blair, "Union Security Agreements in Public Employment", 60 *Cornell L. Rev.* 183, 194 (1975); Cantor, "Forced Payments to Service Institutions and Constitutional Interests in Ideological Non-Association", 36 *Rutgers L. Rev.* 3, 41 n.219 (1984); *and* Henkel & Wood, "Limitations on the Uses of Union Shop Funds After Ellis: What Activities are 'Germane' to Collective Bargaining?", 35 *Lab. L.J.* 736, 743 (1984).

were not, this Court characterized its initial construction of Section 2, Eleventh in *Street* as "entirely reasonable", not merely a "fairly possible" excuse for evading constitutional issues.[73] Second, how the NLRA and RLA separately arrived at parallel—and, in the most important particulars, *identical*—language cannot detract from that parallelism and identity. Indeed, to contend as does CWA that two statutes containing essentially the same language, dealing with the same subject-matter, having the same purpose, and the earlier serving as the model for the later can nevertheless have, not only different, but even radically opposed meanings amounts to "doublethink" in the classical Orwellian pattern, as well as violating basic canons of statutory construction.[74]

a. The parallel statutory language. The linguistic parallel between the NLRA and the RLA could not be more exact than it is. First, both statutes afford employees a right to collective bargaining.[75] Second, both provide for exclusive representation to effectuate collective bargaining.[76] Third, both initially immunize nonunion employees from *pro-* or *anti-*union discrimination.[77] But, fourth, both then partially license such discrimination in 8(a)(3)-type agreements, in next-to-identical language limiting the charges thereunder to uniform "dues" and "fees".[78] The statutes, in short, are (as this Court has noted) "equivalent provision[s]".[79]

Of particular consequence is the parallel language referring to "periodic dues" and "initiation fees" "required as a

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[73] 367 U.S. at 750. [74] *See, e.g.*, Oscar Mayer & Co. v. Evans, 441 U.S. 750, 756 (1979).

[75] NLRA § 7; RLA § 2, Fourth. [76] NLRA § 9(a); RLA § 2, Fourth.

[77] NLRA § 8(a)(3); RLA § 2, Fourth.

[78] NLRA § 8(a)(3); RLA § 2, Eleventh. The reference to "assessments" in the RLA adds nothing in comparison to the NLRA. For, as *Hanson* held, "[i]f 'assessments' are in fact imposed for purposes not germane to collective bargaining", they are subject to the same restraint as "dues". 351 U.S. at 235. *See also* Street, 367 U.S. at 766; Ellis, 466 U.S. at 445-48.

[79] Ellis, 466 U.S. at 452 n.13.

condition of acquiring or retaining membership". This first appeared in the NLRA in 1947, being added to the RLA in 1951 as a "safeguar[d] * * * to protect dissenters' rights", Congress having become concerned that Section 2, Eleventh as originally proposed

> might be used to abridge freedom of speech and beliefs.* * *Objections of this kind led the rail unions to propose an addition [of the above-quoted language. A leading union witness] presented this text and stated, "* * * this bill with the amendment as suggested * * * remedies the alleged abuses of compulsory union membership * * * , yet makes possible the elimination of the 'free rider' and the sharing of the burden of maintenance by all of the beneficiaries of union activity."[80]

What this language meant the witness himself—and, relying on his testimony, among other evidence, this Court in *Street*—made clear, as the Employees describe *post*. Whence the language derived is obvious: from the 1947 amendment of Section 8(a)(3). And Congress itself understood the 1951 amendment precisely as an extension to railway employees of the privilege to make limited 8(a)(3)-type agreements granted to all other employees by the 1947 amendment. Certainly this was the view of the House[81] and Senate[82] committees supervising the bill, of Senators Taft[83] and Hill[84] who joined in supporting it, and of every other Senator and Representative who addressed the question.[85] Indeed, one

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[80] Street, 367 U.S. at 765-66.

[81] H.R. Rep. No. 2811, 81st Cong., 2d Sess. (1950), at 4.

[82] Sen. Rep. No. 2263, 81st Cong., 2d Sess. (1950), at 3.

[83] 96 *Cong. Rec.* 16,267 (1950). [84] *Id.* at 15,735-36; 15,737; 15,738; 16,261.

[85] *Id.* at 15,740 (Sen. Lehman); 16,280 (Sen. Holland); 16,323 (Sen. Thomas); 16,372 (Sen. Pepper); 17,048-49 (Rep. Beckworth); 17,050 (Rep. Hoffman); 17,050-51 (Rep. Wolverton); 17,055 (Rep. Scott); 17,055 (Rep. Biemiller); 17,056 (Rep. Heselton); 17,056 (Rep. Bennett); 17,056 (Rep. Crawford); 17,057 (Rep. Crosser); 17,059 (Rep. Madden); 17,061 (Rep. Vursell).

would presume that Senator Taft, of all people, would have known if the provisions of Section 2, Eleventh were, as he himself characterized them, "*identical* with the Taft-Hartley law" of 1947, that is, Section 8(a)(3).

b. The parallel statutory purpose. Not surprisingly, the linguistic parallel between the acts reflects an identity of purpose addressed to the "free-rider" issue. In *Street*, having exhaustively reviewed the legislative history of Section 2, Eleventh, this Court held that that section

> contemplated compulsory unionism to force employees to share the costs of negotiating and administering collective agreements, and the costs of the adjustment and settlement of disputes. One looks in vain for any suggestion that Congress also meant * * * to provide the unions with a means for forcing employees, over their objection, to support political causes which they oppose.[86]

That limited purpose, of course, is what also animated Section 8(a)(3).[87] Certainly, in that provision as in Section 2, Eleventh, "[o]ne looks in vain for any suggestion that Congress * * * meant * * * to provide the unions with a means for forcing employees * * * to support political causes which they oppose"—and CWA offers no substantiation for that suggestion.

In sum, the legislative and judicial history are compelling: In 1951, Congress enacted Section 2, Eleventh to extend to exclusive representatives under the RLA the same power to compel payments from nonunion employees it had granted under Section 8(a)(3) in 1947. In 1961, this Court held in *Street* that Congress intended the 1951 amendment

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[86] 367 U.S. at 763-64 (footnote omitted). *Accord*, Hanson, 351 U.S. at 235, 238.

[87] *See ante*, pp. 21-22.

to confine compulsory payments to the representatives' costs of collective bargaining. If this Court now decides, as CWA and the United States urge, that Section 8(a)(3) grants *un*limited authority to extract "dues" and "fees" from non-union employees, it must admit that *Street* was wrongly decided, and that the constitutionality of compulsory union "dues" and "fees" under the RLA, *and in the public sector under* Abood v. Detroit Board of Education, is open to re-examination (in addition to the constitutionality of those payments under the NLRA being *sub judice* here).[88] For the Congress that enacted Section 2, Eleventh could not have intended to follow Section 8(a)(3) merely linguistically but not substantively. Indeed, if the language of the latter section compels the construction upon which CWA insists, then the language of the former section, enacted in light of the latter and for the express purpose of achieving uniformity of policy in both acts, *must* extend unlimited license to exclusive representatives; *Hanson*, *Street*, *and Abood must* be wrong; and the most important constitutional issues in this area *must* be recognized as unsettled.

Conversely, if this Court determines that *Hanson* and *Street* are correct, after all, but that Section 8(a)(3) need *not*

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[88] *Hanson* predicated its constitutional decision, upholding Section 2, Eleventh "on its face", on the statutory interpretation that Congress meant only for "the beneficiaries of trade unionism to contribute to its cost", and that "[t]he financial support required relates * * * to the work of the union in the realm of collective bargaining" only. 351 U.S. at 235. If this construction is now repudiated, then (as *Hanson* itself conceded) its "judgment will not prejudice the decision" in a case challenging the constitutionality of Section 2, Eleventh even "on its face". *Id.* at 238.

In upholding 8(a)(3)-type agreements in public-sector employment, the *Abood* Court relied on "the judgment * * * made in *Hanson* and *Street*", noted that "those two decisions * * * appear to require validation of the [public-sector] agreement [*sub judice*]", and treated "*Hanson* and *Street* as controlling". 431 U.S. 209, 217-32. If this Court now determines that *Street* was wrongly decided—and, therefore, that *Hanson* too rests on a faulty premiss of statutory construction—then *Abood* must fall as well.

be construed as was Section 2, Eleventh, it will frustrate the manifest intent of Congress and numerous state legislatures to erect a truly *uniform* national labor policy as far as 8(a)(3)-type agreements are concerned. For example, CWA represents nonunion employees subject to 8(a)(3)-type agreements throughout the private and public sectors.[89] Where the RLA and public-sector laws govern, nonunion employees represented by CWA will be subject to compulsory payments of around 20% of CWA's regular membership-dues (using the figures found appropriate after two plenary hearings below). Whereas, where the NLRA governs, other nonunion employees represented by CWA—and for whom CWA provides essentially the same services in collective bargaining—will be subject to compulsory payments equal to CWA's membership-dues. And this nearly *five-fold* disparity will have no rational connexion to any extra benefits the second set of employees arguably receives. To justify such unequal and nonrational treatment is impossible, as a matter of the premisses of labor law, of the language of Sections 2, Eleventh and 8(a)(3), of what Congress said it was doing in 1947 and 1951, and of this Court's decisions in *Radio Officers' Union, General Motors Corp.*, *Hanson*, *Street*, and particularly *Abood*, the burden of which is the uniformity of purpose infusing the NLRA, RLA, and public-sector bargaining laws as far as exclusive representation and 8(a)(3)-type agreements are concerned.[90]

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[89] This case involves a typical NLRA certification. As examples of RLA certifications, *see In re* Representation of Employees of Air India Teletype Operators, Case No. R-3793 (Nat'l Mediation Bd., 27 October 1965); *In re* Representation of Employees of British Overseas Airways Corp., Teletype Operators, Case No. R-3832 (Nat'l Mediation Bd., 30 June 1966). CWA's presence in public-sector bargaining is exemplified by *Robinson* v. *New Jersey*, No. 86-1654 (U.S., October Term 1986), *cert. denied* 26 May 1987.

[90] *See* 431 U.S. at 220-25, comparing the NLRA, the RLA, and Michigan law under consideration there.

C. If Sections 8(a)(3) and 9(a) do not preclude CWA from conditioning the employment of nonunion employees upon payment of the costs of "collective bargaining" only, those sections are repugnant to the First and Fifth Amendments because they license CWA to abridge the Employees' freedoms of association and speech, and confiscate portions of their wages, without any compelling governmental interest in, or even rational basis for, such abridgement and confiscation.

Amazingly, CWA and the United States both ultimately rely solely on the absence of "governmental action" in 8(a)(3)-agreements—saying nothing about the constitutionality *vel non* of the NLRA if "governmental action" exists and their unlimited statutory construction is adopted. This curious silence, coupled with their craven refusal to address *Steele*, impliedly admits they can conjure no theory of constitutionality for Section 8(a)(3) as they interpret it, at least in light of *Abood*.[91] Nevertheless, the Employees will not rely merely on this admission by omission, or solely on *Abood*, to establish the unconstitutionality of Sections 8(a)(3) and 9(a) should this Court accept CWA's construction. Moreover, because of the dearth of analysis in CWA's brief, the Employees respectfully urge this Court, if it must address the constitutional issues, to order the parties to submit further arguments on the subject.

Three aspects of the unconstitutionality of CWA's construction of Section 8(a)(3) are subject to summary treatment: first, its violation of the Employees' First-Amendment rights, under the doctrine this Court enunciated in *Abood*; second, its violation of their Fifth-Amendment rights, as a delegation to private parties of a power to "tax"; and third,

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[91] Thus, CWA's bluff that "this case * * * is entirely unlike *Abood*". BP at 12 n.8. The United States seems to accept *Abood* as controlling where "governmental action" is present. *See* BUS at 28.

its violation of their Fifth-Amendment rights as a statutory condition on their employment without legitimate rational basis.

1. The **Abood** *doctrine.* Although the Employees benefit from an unqualified reading of *Abood*, concern for a correct rather than a convenient resolution of this case counsels them to treat that decision's complexities with candor. In fact, in *Abood* this Court divided over whether an 8(a)(3)-type agreement in public employment is constitutional where the exclusive representative uses the payments solely to defray the costs of bargaining, some Justices suggesting that such a use serves substantial governmental interests, while other Justices questioned that assumption.[92] And the existence *vel non* of substantial—or, indeed, of any kind of—governmental interests subtending the state law at issue was an *assumption* only, not a fact. For the appeal came to the Court devoid of any factual record,[93] leaving the question *un*resolved *strictissimi juris*.[94] However, every Justice but one[95] agreed that compulsory payments to finance activities of the exclusive representative other than collective bargaining *absolutely* violate the First and Fourteenth Amend-

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[92] *Contrast* 431 U.S. at 224-26 (opinion of Stewart, J.) *with id.* at 259-64 (opinion of Powell, J.).

[93] *Id.*at 236 (opinion of Stewart, J.), 244 n. (opinion of Stevens, J.).

[94] *Compare* Polk Co. v. Glover, 305 U.S. 5, 10 (1938), *and* Borden's Farm Prods. Co. v. Baldwin, 293 U.S. 194, 212 (1934) (essential facts should be decided before Court addresses constitutional issue), *with* United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938), *and* Borden's Farm Prods. Co., 293 U.S. at 209-13 (litigant has constitutional right to adduce facts to disprove rational basis of statute).

Importantly, *Hanson* and *Street*, upon which *Abood* primarily relied, mitigate this problem not at all. For *Hanson*, too, was bereft of the necessary factual record; and, although that record obtained in *Street*, the Court there avoided a constitutional decision through construction of Section 2, Eleventh. *Compare* 351 U.S. at 236-38 *with* 367 U.S. at 746-50.

[95] 431 U.S. at 243-44 (opinion of Rehnquist, J.).

ments.[96] CWA's construction of Section 8(a)(3) permits such payments, and therefore condemns itself under *Abood*.

2. The problem of private "taxation". The common jargon for the type of 8(a)(3)-agreement at issue here is an "agency-fee" arrangement, signifying payment by nonunion employees (the "fee") for the union's services as exclusive representative (the "agency"). The compulsory character of exclusive representation renders the adjective "agency" misleading; but the noun "fee" has peculiar constitutional significance.

The Due Process Clause of the Fifth Amendment disables Congress from delegating the sovereign power of taxation (or any power within Article I, Section 8 of the Constitution, for that matter) to private parties,[97] or from using that power for their exclusive benefit.[98] The authorization in Section 8(a)(3) for a Section 9(a) representative to collect "dues" and "fees" from nonunion employees, then, is necessarily unconstitutional unless those payments are distinguishable from taxes.

National Cable Television Association, Inc. v. *United States* differentiated "fees" from "taxes" in the context of assessments the Federal Communications Commission levied against broadcasters for services it performed for them.[99]

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[96] *Id.* at 230, 235-36 (opinion of Stewart, J.); 244 (opinion of Stevens, J.); 254 (opinion of Powell, J.). As Justice Powell said: "The Court today holds that compelling an employee to finance a union's ideological activities unrelated to collective bargaining violates the First Amendment *regardless of any asserted governmental justification.*" (Emphasis supplied.)

[97] *Compare* Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 514 (1937), *with* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 537 (1935), *and* Carter v. Carter Coal Co., 298 U.S. 238, 311 (opinion of the Court), 318 (Hughes, C.J., concurring) (1936).

[98] *See*, under the Due Process Clause of the Fourteenth Amendment, Loan Association v. City of Topeka, 87 U.S. (20 Wall.) 655, 662-64 (1874); Cole v. City of La Grange, 113 U.S. 1, 6-7 (1885); City of Parkersburg v. Brown, 106 U.S. 487, 500-01 (1882).

[99] 415 U.S. 336 (1974).

Recognizing that "[t]axation is a legislative function", and that a legislature "may act arbitrarily and disregard benefits bestowed by the Government on a taxpayer and go solely on ability to pay", this Court distinguished a "tax" from a "fee" on the ground that a "fee" is assessed for a service "which * * * bestows a benefit on the [payer], not shared by other members of society".[100] Then, the Court acknowledged that the statute would unconstitutionally delegate the power of taxation—*if* it licensed the FCC to assess "not only for benefits [broadcasters] received" from its services, but also for other of its activities unrelated to them in particular.[101] To avoid constitutional problems, the Court construed the statute narrowly, limiting the FCC's exactions to reflect actual benefits conferred on the broadcasters.[102] *National Cable Television Association* thus enunciated the principle that an assessment related to services an agency provides to the payer in particular is a constitutional "fee"; whereas, an assessment unrelated to such services is an unconstitutional "tax". And so the inferior national courts have interpreted that decision.[103]

Other decisions of this Court also rely on the constitutional dichotomy between "fees"—which fairly represent the costs of services provided to a select class of recipients, and "taxes"—which constitute "forced contribution to general governmental revenues".[104]

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[100] *Id.* at 340-41.

[101] *Id.* at 341-42, *citing* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935), *and* Hampton & Co. v. United States, 276 U.S. 394 (1928).

[102] 415 U.S. at 341, 342-43. *Accord*, FPC v. New England Power Co, 415 U.S. 345, 349-51 (1974). *Contrast* Carmichael, 301 U.S. at 521-23; New York Rapid Transit Corp. v. City of New York, 303 U.S. 573, 584-87 (1938).

[103] *E.g.*, Mississippi Power & Light Co. v. United States Nuclear Regulatory Comm'n, 601 F.2d 223, 227-28 (5th Cir. 1979); National Ass'n of Broadcasters v. FCC, 554 F.2d 1118, 1128-30 (D.C. Cir. 1976).

[104] Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 162-65 (1980); continued

CWA's construction of Section 8(a)(3) abjures any limitation of "dues" and "fees" to the demonstrable costs of statutorily permissible collective-bargaining services the exclusive representative provides nonunion employees. Rather, it blatantly defines those payments as intended to defray *all* expenses of a Section 9(a) union, including both the costs of performance of its statutory representational duties and its other, unrelated institutional expenses. CWA's construction thus unequivocally identifies Section 8(a)(3) payments as a species of private "taxes", and condemns that section as an unconstitutional delegation of legislative power to private parties.

3. The absence of a legitimate rational basis. An outstanding demerit of CWA's reading of Section 8(a)(3) is its failure to explain what legitimate purpose Congress could have had, in the context of the whole statutory scheme establishing collective bargaining through exclusive representation, for licensing the representatives to force nonunion employees to finance union institutional activities *unrelated* to bargaining. Indeed, neither CWA nor the United States even attempts to identify a rational basis for—let alone a "compelling" governmental interest in—such an arrangement.[105]

This absence of operational explanation for their radical position is hardly surprising, in light of the tight statutory interrelationship among Sections 8(a)(3), 8(d), and 9(a), discussed heretofore. What CWA fails to realize, however, is that, in the context of that interrelationship evidencing on the face of the statute the congressional purpose in setting up the system of exclusive representation, its construction

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Union Brokerage Co. v. Jensen, 322 U.S. 202, 210-11 (1944); New Mexico *ex rel.* E.J. McLean & Co. v. Denver & R.G.R.R., 203 U.S. 38, 55 (1906); Morgan's Steamship Co. v. Louisiana Board of Health, 118 U.S. 455, 461-62 (1886).

[105] *See* BP at 23-40; BUS at 14-20.

renders Section 8(a)(3) *pro tanto* unconstitutional because of the obvious lack of any rational connexion between, on the one hand, subordination of nonunion employees to Section 9(a) representatives for the limited purpose of Section 8(d) "collective bargaining" and, on the other hand, compulsory financial support from those employees for whatever institutional activities alien to that bargaining a union chooses to undertake.

The absence of rational connexion between Section 9(a) activities of an exclusive representative and the payment of "*full* union dues" is self-evident and undeniable through comparison of the limited statutory definition of "collective bargaining" to the experientially unlimited activities that unions traditionally subsidize with "*full* dues".[106] And this Court, in decision after decision, has foreclosed the question of what *unique* rational basis justifies 8(a)(3)-type agreements, by explaining the legislative license to make these agreements as a device, in the nature of *quantum meruit*, for guaranteeing reimbursement to an exclusive representative for the costs it incurs in providing beneficial services to nonunion employees through statutory "collective bargaining". For example, *Hanson* held that "the requirement [of Section 2, Eleventh] for financial support of the *collective bargaining* agency by all who receive the *benefits of its work* is [constitutional]".[107] *Street* relied on "the principal argument made by the unions" in support of the latter section,

> that because of the expense of performing their duties [as exclusive representatives], fairness justified spreading of the costs to all employees who benefitted. They thus advanced as the purpose the elimination of "free

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[106] *See* Local 1625, Retail Clerks v. Schermerhorn, 373 U.S. 746, 753-54 & n.6 (1963).

[107] 351 U.S. at 238 (emphasis supplied).

> riders"—those employees who obtained the *benefits of the unions' participation in the machinery of the Act* without financially supporting the unions.[108]

Then, referring to Section 8(a)(3), *General Motors Corp.* described how

> Congress recognized that in the absence of [an 8(a)(3)-agreement] "many employees sharing the benefits of what unions are able to accomplish *by collective bargaining* will refuse to pay their share of the cost." * * * As far as the federal law was concerned, all employees could be required to pay their way.[109]

And, surveying labor-relations experience in both the public and the private sectors, *Abood* again expounded that an 8(a)(3)-agreement

> has been thought to distribute fairly the cost of [collective bargaining] activities among those who benefit, and it counteracts the incentive that employees might otherwise have to become "free riders"—to refuse to contribute to the union while obtaining *benefits of union representation* * * * .[110]

Even more specifically, this Court has pinpointed the rationale of 8(a)(3)-type arrangements by identifying the services for which "dues" and "fees" are chargeable. For example, *Hanson* held that "[t]he financial support required relates * * * to the work of the union *in the realm of collective bargaining*".[111] *Street* referred to "a use which helps

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[108] 367 U.S. at 761 (emphasis supplied). Concurring, Justice Douglas recalled that the Court had "concluded in [*Hanson*] that it was permissible for the legislature to require all who gain from *collective bargaining* to contribute to *its* cost". *Id.* at 776 (separate opinion) (emphasis supplied).

[109] 373 U.S. at 740-41 (emphasis supplied).

[110] 431 U.S. at 221-22 (opinion of Stewart, J.) (emphasis supplied).

[111] 351 U.S. at 235 (emphasis supplied).

defray the expenses *of the negotiation or administration of collective agreements*, or the expenses entailed in the adjustment of grievances and disputes".[112] *Abood* cited "[t]he tasks of *negotiating and administering a collective bargaining agreement* and representing the interests of employees in settling disputes and processing grievances"; "expenditures by the Union for the purpose of *collective bargaining, contract administration, and grievance adjustment*"; and "service charges * * * applied to *collective bargaining, contract administration, and grievance adjustment purposes*".[113] And *Ellis* re-affirmed as "the test" "whether the * * * expenditures are necessary or reasonably incurred for the purpose of performing the *duties of an exclusive representative* * * * in dealing with the employer on labor-management issues".[114]

In sum, *the one and only* rational basis—both on the face of the statute and as repeatedly recognized in this Court's opinions—for 8(a)(3)-agreements is to compel nonunion employees to pay their share of the costs of beneficial services they receive from the "collective-bargaining" activities of their Section 9(a) representative. To extend those payments beyond those costs in a wholly arbitrary and uncontrollable fashion, as CWA urges, would be to abandon this uniquely justifiable *quid pro quo* rationale, without a legitimate substitute, thereby undermining the constitutionality of Section 8(a)(3) in the most fundamental way possible.[115]

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[112] 367 U.S. at 768 (emphasis supplied).

[113] 431 U.S. at 221, 225-26, 232 (opinion of Stewart, J.) (emphasis supplied).

[114] 466 U.S. at 448 (emphasis supplied).

[115] Their statement alone explodes the notions that Congress may license unions to "tax" nonunion employees in order: (i) to pressure those employees into subjecting themselves to full union membership, rules, and discipline; (ii) to impose ideological conformity by forcing employees to subsidize union*ism per se*, as well as the political and social activism of unions; or (iii) to redistribute wealth from nonunion to union employees, by giving the latter an *ersatz* "property right" in the work of

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The foregoing establishes that: (i) Section 9(a) is the source of the "governmental action" infusing Section 8(a)(3), as clearly held in *Steele*; (ii) "governmental action" aside, those sections deny exclusive representatives authority to condition employment of nonunion employees on payments of "dues" or "fees" exceeding the employees' *pro rata* share of the representatives' statutory "collective-bargaining" costs; and (iii) if Sections 8(a)(3) and 9(a) do license exclusive representatives to compel arbitrary and unlimited payments, then those sections are *pro tanto* unconstitutional under the First and Fifth Amendments.

II. The violation of Sections 8(a)(3) and 9(a) found in this case is not within the "primary jurisdiction" of the National Labor Relations Board, under the doctrine of *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959).

The parties' positions congress, in that all recognize the fundamental substantive issue in this case is the construction of NLRA Sections 7, 8(a)(3), and 9(a). Their positions diverge, in that CWA contends those sections permit, whereas the Employees assert that they prohibit, unlimited "dues" and "fees". Because, if CWA is correct, Section 7 privileges its behavior, or, if the Employees are correct, that behavior constitutes an "unfair labor practice" within the cognizance of the National Labor Relations Board under Section 8, the problem of "primary jurisdiction" arises perforce of this Court's decision in *San Diego Building Trades Council* v. *Garmon*.[116] Both CWA and the United States find *Garmon* inapplicable, because the instant case involves the duty of fair representation and constitu-

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the former. Purposes such as these cannot survive scrutiny under the Commerce Clause itself, let alone the First, Fifth, or Thirteenth Amendments. And even CWA shrinks from asserting them.

[116] 359 U.S. 236, 245 (1959).

tional questions.[117] Although the Employees also endorse these propositions, they submit that more detailed consideration of the matter is warranted.

A. CWA breached its duty of fair representation.

Erroneous is CWA's characterization of the Employees' claim as alleging a violation of the duty of fair representation for purposes of "primary jurisdiction", but failing to establish "arbitrary, discriminatory, or bad-faith" conduct.[118] For CWA's demand to charge the Employees "*full* union dues" under color of Section 8(a)(3) is, on its face, all of these.

1. Discriminatory conduct. CWA pretends it "has not acted in a '*discriminatory*' fashion", because it charged *all* employees in the bargaining unit the *same* "*full* union dues".[119] The duty of fair representation relates, however, not to CWA's overall institutional functions as a private association of voluntary members, but only to its *quasi*-governmental status as the Employees' compulsory exclusive representative. Thus, "discrimination" must be determined in the context, not of what CWA does as a private organization, but of the activities it has Section 9(a) permission to undertake.

CWA's "*full* union dues" include: (i) the portion used to finance Section 9(a) activities (the "collective-bargaining" amount, *CB*); and (ii) the portion used to finance its other, *extra*-representational activities (the "voluntary-member" amount, *VM*). CWA demands that *all* employees pay, by choice or by compulsion through the 8(a)(3)-agreement, *CB plus VM*. Now, because Sections 8(a)(3) and 9(a) license

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[117] BP at 6-11; BUS at 11 n.9.

[118] *Compare* BP at 9-10 *with id.* at 45-58.

[119] *Id.* at 45-46.

CWA to extract from the Employees *only CB* by force of law, but in fact CWA claims *CB and VM* under color of Section 8(a)(3), a stark dichotomy exists: (i) its voluntary members pay *only CB* under force of law, and *VM* voluntarily; whereas, (ii) the Employees pay *CB plus VM* under force of law—indeed, as the record emphasizes, nearly *five times* as much as the voluntary members pursuant to force of law, *CB* representing only some 19% of "*full* union dues". The discriminatory effects of this situation are two-fold:

First, if CWA expends *all* of the Employees' Section 8(a)(3) "dues" and "fees" on Section 9(a) activities, they pay for the same statutory "collective-bargaining" services more than CWA's voluntary members, precisely because of their nonunion status.[120]

Second, if CWA expends *some or all* of those receipts on its private institutional activities *outside* of Section 9(a), the Employees pay either for benefits they cannot receive because those benefits inure only to voluntary members, or for actual detriments they suffer because of the—noxious to them—political, ideological, economic, or social effects of CWA's *extra*-statutory actions that extend beyond its voluntary members and other partisans.

Thus, *pace* CWA, the Employees seek not to be treated "differently" from the union's voluntary members under Section 8(a)(3), but rather to pay the selfsame "dues" and "fees" for Section 9(a) services, without being required under color of law to make further payments.

2. Arbitrary conduct. Sensing that its claim of "nondiscriminatory" treatment lacks credibility, CWA defends its policy of requiring "*full* union dues" as "an entirely rational, non-arbitrary course" because

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[120] *See* Local 1625, Retail Clerks v. Schermerhorn, 373 U.S. 746, 753-54 (1963).

> [a] union represents—indeed must represent—all employees within the bargaining unit, and the union's accomplishments necessarily redound to the benefit of all members of the unit; that is true not only of gains achieved by a union in negotiating and administering collective bargaining agreements but also of gains achieved by the union through other means of furthering the represented workers' employment interests.[121]

The fallacy here, of course, is that "[a] union represents—indeed must represent—all employees within the bargaining unit" *only with respect to permissible Section 9(a) concerns*, and has *no* statutory "representational" authority to "furthe[r] * * * workers' employment interests" "through *other* means".[122] Thus, CWA's lament attempts either to read Section 9(a) out of Section 8(a)(3), or to expand Section 9(a) into an open-ended mandate to posture as the Employees' "Platonic Guardian". CWA's policy of requiring the Employees to pay "*full* union dues", in short, is necessarily *non*-rational and arbitrary, because it misapplies Section 9(a) to achieve union institutional goals unrelated to the purposes of the NLRA, and invalid under the First and Fifth Amendments *inter alia*.

CWA's apology that requiring "*full* union dues" "prevents the friction among employees that otherwise can arise within a bargaining unit if some employees pay less * * * than others" begs the question.[123] Because the only "dues" permissible under Section 8(a)(3) are the exclusive representative's costs of statutory "collective bargaining" under Sections 9(a) and 8(d), by paying only those costs all employees in the unit bear the *same* statutorily imposed (or permissible)

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[121] BP at 46.

[122] *See, e.g.*, National Treasury Employees Union v. FLRA, 800 F.2d 1165, 1168-71 (D.C. Cir. 1986) (Bork, J.).

[123] BP at 46-47.

financial burden. *No one* "pay[s] less in union dues than others" *under the statute*. That CWA's voluntary members may express rancour because nonunion employees choose not to subsidize its non-statutory activities exposes a deplorable lack of charity, but constitutes no legal basis for compelling nonunion employees to pay *more* for CWA's Section 9(a) activities, so that its members pay *less* for institutional programs.

Finally, CWA rationalizes its policy of "*full* union dues" as

> avoid[ing] the substantial expense entailed in determining each year what portion of the union's expenditures are devoted to activities germane to the union's role as exclusive representative and what portion goes for other activities.[124]

Of course, this avails CWA nothing (whatever its relevance to other unions), in as much as CWA already must bear such "expense" to satisfy its burden of proof where it represents employees under the RLA or various state public-sector compulsory-bargaining laws.[125] Moreover, once again, the contention begs the question. Because Section 8(a)(3) affirmatively limits compulsory "dues" and "fees" to that portion of a union's expenditures devoted to its role as exclusive representative, CWA must justify its exactions through a verified *pre*-collection notice, and *post*-collection proofs.[126] That this justification is not costless hardly counsels abandonment of statutory strictures. Congress did not say in Section 8(a)(3)—and certainly the First and Fifth Amendments do not say—that an exclusive representative may extract *un*limited "dues" and "fees" if it simply whines that proving any entitlement entails "substantial expense". For "adminis-

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[124] *Id.* at 47. [125] *See ante* note 90.

[126] *See* Chicago Teachers Union, Local No. 1 v. Hudson, ____ U.S. ____, 106 U.S. 1066 (1986).

trative convenience alone is insufficient to make valid what otherwise is a violation of due process of law".[127]

*3. **Bad-faith conduct.*** CWA also denies "any basis for believing" that its policy of demanding "*full* union dues" "was animated by 'bad faith' * * * by using the funds * * * to engage in the range of activities 'regularly engaged in by modern unions,' * * * including activities * * * not strictly part of the union's role as bargaining representative narrowly defined". [128] But this very statement belies its innocence, admitting *sotto voce* it always knew it was expending compulsory "dues" and "fees" on activities *outside* its Section 9(a) authority—what it calls its "role as bargaining representative *narrowly defined*", that is, *as defined by law.*

Because the discrimination in this case is crystal clear, no specific proof of CWA's intent is necessary.[129] But, overall, the record exposes CWA's contempt for its statutory—let alone its constitutional—duties, in the teeth of the language and purpose of the act and of this Court's admonitions in *Steele*, *Hanson*, *Street*, *Abood*, *Ellis*, and numerous other cases. CWA admits it spent the Employees' "dues" and "fees" on activities outside Section 9(a)—and the District Court so found, to the extent of nearly four-fifths of the collections. CWA admits it maintained no records apportioning its costs between "collective-bargaining" and other activities[130]—and, rather than correcting this deficiency by establishing such an accounting-system, now proposes to meet its burden of proof through superimposition on its

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[127] Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 647 (1974). *See* Ellis, 466 U.S. at 444.

[128] BP at 46.

[129] *See* Radio Officers' Union, 347 U.S. at 44-52.

[130] Even CWA's own accountant described the task of sorting out its "collective-bargaining" costs as equivalent to trying to make a "frog fly". Appendix to Petition for a Writ of Certiorari in No. 86-637, at 253a.

present, inadequate accounts of a new, complex, and untested scheme of "statistical sampling", verification of which demands burdensome oversight by experts retained by the Employees. And CWA admits it charged all individuals in the bargaining-unit the same "*full* union dues", although it knew that nonunion employees and voluntary union members received unequal services, and that its inadequate records evidenced "collective-bargaining" costs of only about one-fifth of the "dues" and "fees" collected.

For CWA to call its behaviour unintentional defies common sense and its own concessions. That its discrimination was severe the disproportion between the amount charged (nearly 100% of "*full* union dues") and the amount proven proper (only about one-fifth of "*full* dues") establishes. And that its discrimination was unrelated to—indeed, contradictory of—legitimate Section 9(a) objectives CWA itself brazenly admits, describing its activities as "not strictly part of [its] role as bargaining representative *narrowly defined*". This suffices to show "bad faith" as a matter of law.

4. Usurpatory conduct. Finally, CWA touches the heart of the problem when it denies "there is any basis for concluding that a union breaches its duty of fair representation by expending dues money for activities beyond direct collective bargaining narrowly defined".[131] Yet a duty to represent employees fairly with respect to statutorily defined activities necessarily implies a duty not to pretend to represent them otherwise. For an assertion of non-existent representational powers is always "unfair", discriminatory, and arbitrary; and, in paradigmatic cases such as this one, inferentially motivated by bad faith, too. Or, *usurpation of Section 9(a) authority is a* per se *violation of the duty of fair representation.*

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[131] BP at 47.

In sum, the record exhibits a classic violation of the duty of fair representation. And, as the parties, the United States, and this Court agree, a case bottomed on the duty of fair representation lies outside the Board's "primary jurisdiction".[132]

B. Congress excluded 8(a)(3)-agreements from the "primary jurisdiction" of the Board; and the courts should exercise concurrent jurisdiction to define limits on such agreements, in order to avoid conflicting standards under the National Labor Relations Act, the Railway Labor Act, and numerous public-sector collective-bargaining statutes.

"Primary jurisdiction" is also inapplicable here for two, perhaps more fundamental, reasons inherent in that doctrine itself.

1. The intent of Congress. *Garmon* "does not state a constitutional principle", but reflects a determination of congressional intent as to which tribunal—the Board or the courts—should address a problem "in the field of labor relations". "The purpose of Congress is the ultimate touchstone."[133]

Where (as here) 8(a)(3)-agreements are concerned, Congress *never* "pre-empted" legislative and judicial oversight by the States, but instead always encouraged a policing role for them independent from, if not actually superior to, that of the Board.[134] Because "the agreements requiring 'membership' in a labor union which are expressly permitted by the proviso [tc Section 8(a)(3)] are the same 'membership' agreements expressly placed within the reach of state law

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[132] Vaca, 386 U.S. at 176-88.

[133] Local 1625, Retail Clerks v. Schermerhorn, 375 U.S. 96, 103 (1963).

[134] *Id.* at 102-05.

by [NLRA] § 14(b)";[135] and because Congress intended the legality of those agreements not to be within the exclusive jurisdiction of the Board as against *state* authorities; it would be anomalous to oust the *national* courts of jurisdiction over the very subject-matter that Congress has determined requires no pre-emptive commitment to the Board.

2. Uniform substantive law. *Garmon* finds a "primary justification" in "the need to avoid conflicting rules of substantive law in the labor relations area and the desirability of leaving the development of such rules to" the Board.[136] Where (as here) 8(a)(3)-agreements are concerned, however, conceding "primary jurisdiction" to the Board will promote, not avoid, conflict. For the substantive law of such agreements under the RLA and public-sector compulsory-bargaining acts already lies within the courts' exclusive jurisdiction, under *Hanson*, *Street*, and *Ellis* (RLA) and *Abood* and *Hudson* (public-sector statutes). And as this Court explained in *Abood*, after broadly surveying the issue in both private and public-employment,

> [t]he differences between public- and private-sector collective bargaining simply do not translate into differences in First Amendment rights [of non-union employees] * * * "[t]he union security issue in the public sector . . . is fundamentally the same issue . . . as in the private sector * * * ."[137]

Thus, because Section 8(a)(3) is equivalent to Section 2, Eleventh and similar public-sector provisions, the final authorities on the subject must be the judiciary. No room exists for the Board to assert an independent rule-making role when its decisions must conform to judicial mandates

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[135] Local 1625, Retail Clerks v. Schermerhorn, 373 U.S. 746, 751 (1963).

[136] Vaca, 386 U.S. at 180-81.

[137] 431 U.S. at 232.

under the RLA and public-sector laws. Therefore, a compelling reason exists for rejecting the *Garmon* doctrine altogether as to 8(a)(3)-agreements.

C. An appropriate remedy for violations of Sections 8(a)(3) and 9(a) such as found here could include arbitration, to which Congress did not intend the Board's "primary jurisdiction" to apply, and under which circumstances the Board itself would defer to the arbitral forum.

In *Chicago Teachers Union, Local No. 1* v. *Hudson*, this Court suggested that "an expeditious arbitration might satisfy" First- and Fourteenth-Amendment due-process requirements in a compulsory-union-fee case.[138] If (as the Employees urge in their cross-petition) *Hudson* applies to the NLRA, then another powerful legal-*cum*-practical consideration militates against the "primary-jurisdiction" doctrine.

Congress has unequivocally endorsed arbitration of labor disputes, notwithstanding that controversies arguably raising "unfair-labor-practice" issues may be adjudicated in fora other than the Board.[139] And this Court has held that the congressional policy favoring arbitration outweighs considerations supporting "primary jurisdiction".[140] Moreover, although the Board has jurisdiction over "unfair labor practices" arguably subject to arbitration under collective-bargaining agreements,[141] it sustains arbitral awards where the arbitrators consider the alleged "unfair labor practi-

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[138] ____ U.S. at ____ n.21, 106 S. Ct. at 1077 n.21.

[139] 29 U.S.C. § 173(d). *See* Steelworkers v. American Mfg. Co., 363 U.S. 564, 566-68 (1960); Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960).

[140] Carey v. Westinghouse Electric Corp., 375 U.S. 261, 272 (1964).

[141] NLRB v. Strong, 393 U.S. 357, 360-61 (1969).

ces";[142] and defers to awards not clearly repugnant to the NLRA.[143] Thus, no one—not Congress, this Court, or the Board—considers "primary jurisdiction" appropriate in the arbitral context.

In short, because arbitration is a possibly preferred remedy in cases such as this, *Garmon* is inapplicable.

D. If violations of Sections 8(a)(3) and 9(a) such as that found here are within the "primary jurisdiction" of the Board, and therefore subject to the supposedly "unreviewable" discretion of its General Counsel, this Court must now decide the constitutional issues of exclusive representation avoided in *Steele* v. *Louisville & Nashville Railroad Co.*, 323 U.S. 192 (1944).

The final, decisive consideration against "primary jurisdiction" is constitutional. As *Vaca* v. *Sipes* explained, were "primary jurisdiction" to obtain in duty-of-fair-representation cases,

> the individual employee injured by arbitrary or discriminatory union conduct could no longer be assured of impartial review of his complaint, since the Board's General Counsel has unreviewable discretion to refuse to institute an unfair labor practice complaint. * * * The existence of even a small group of cases in which the Board would be unwilling or unable to remedy a union's breach of duty would frustrate the basic purposes underlying the duty of fair representation doctrine.[144]

But, were the "basic purposes" of the duty of fair representation frustrated, constitutional issues would unavoidably come to the fore. For *Steele* warned that

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[142] *E.g.*, Spielberg Mfg. Co., 112 N.L.R.B. 1080 (1955); International Harvester Co., 138 N.L.R.B. 923 (1962).

[143] *E.g.*, Virginia-Carolina Freight Lines, 155 N.L.R.B. 447 (1965).

[144] 386 U.S. at 182-83.

> [i]n the absence of any available administrative remedy, the right * * * to a remedy for breach of the * * * duty of the bargaining representative * * * would be sacrificed or obliterated if it were without the remedy which courts can give * * * and which it is their duty to give in cases in which they have jurisdiction.[145]

And, if the duty did not exist—originally, or because a remedy for its breach did not exist, or because the courts lacked jurisdiction to offer that remedy "[i]n the absence of any available administrative remedy"—"constitutional questions [would] arise" as to the legitimacy of exclusive representation.[146]

The Employees doubt (and this Court has never held) that the General Counsel of the Board could have "*unreviewable* discretion" under our Constitution to extinguish fundamental employee rights by capriciously denying remedies for their violation. However, if this Court should hold that "primary jurisdiction" attaches to illegal 8(a)(3)-agreements, it will perforce of *Steele* be required to decide two interrelated constitutional questions of the utmost gravity: namely, (i) whether the asserted "unreviewable discretion" of the General Counsel can coexist with the Constitution; and (ii) if such "unreviewable discretion" is constitutional, whether Section 9(a) is therefore unconstitutional.[147]

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[145] 323 U.S. at 207.

[146] *Id.* at 198-99.

[147] *Compare* Carter, 298 U.S. at 311 (opinion of the Court), 318 (Hughes, C.J., concurring), *and* Schechter Poultry Corp., 295 U.S. at 537, *with* Jones & Laughlin Steel Corp., 301 U.S. at 45, *and* Virginian Railway, 300 U.S. at 548-49, *in the light of* J. Gross, *ante* note 9, at 187.

CONCLUSION

For the foregoing reasons, the Employees pray that this Court affirm the decision of the Court of Appeals.

Respectfully submitted,

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